84108-0

Supreme Court No. 84108-0
Court of Appeals No. 27184-6-III

**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

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NEIGHBORHOOD ALLIANCE OF SPOKANE COUNTY,
a non-profit corporation,

Petitioner,

v.

COUNTY OF SPOKANE,
a political subdivision of the State of Washington,

Respondent.

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PETITIONER'S ~~ANSWER~~ TO RESPONDENT'S CROSS-PETITION FOR REVIEW

Reply to answer

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CENTER FOR JUSTICE
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## A. IDENTITY OF PETITIONER

As allowed by RAP 13.4(d), Petitioner Neighborhood Alliance of Spokane County ("Alliance") submits this answer to the new issues raised in Respondent Spokane County's ("County's") cross petition.

## B. STATEMENT OF THE CASE

### Introduction

The County requests discretionary review of the Court of Appeals' decision that the County failed to conduct an adequate search for a public record requested by the Alliance. *Neighborhood Alliance of Spokane County v. Spokane County*, 151 Wn. App. 1043, 2009 WL 2456857 at 7 (Wn. App. Div. 3 2009). The Alliance, a community-based organization in Spokane County that emphasizes government accountability, received an undated seating chart showing the seating arrangements of employees of the Spokane County Building and Planning Department that led it to believe the County may have engaged in illegal hiring practices. (CP 90-93.) In order to determine whether this was so, the Alliance needed to know the date the chart was created. To that end, it made a public records request for the complete electronic log of the chart which would show the date of creation. *Id.* The County searched the only place the log could *not* be found and made no efforts to look in the one place it could have been

found. (CP 61, 608-612.)The complete electronic log showing the date of creation was never produced and at some point destroyed.

**Supplemental Facts**

On February 16, 2005, a copy machine in the Spokane County Building and Planning Department began printing numerous copies of an undated seating chart showing the cubicles where department employees sit. (CP 60, 283-284.) The chart came from Assistant Director Pam Knutsen's computer. (CP 60-61; 284) The chart depicted seating arrangements in cubicles of current employees on the first floor of the Building and Planning Department as well as two new employees who had not yet been hired, "Ron and Steve." (CP 283-284.)

On or about February 18, 2008, Building and Planning Department planner Theresa (Terry) Liberty sent a copy of the undated seating chart and an unsigned letter to Marilyn Moos, at that time a member of the local Human Rights Commission. (CP 342-343.) Ms. Moos received the letter with the copy of the undated Spokane County planning seating chart by U.S. Mail on or about February 19, 2005. (CP 84-89.) Ms. Moos provided true and correct copies of the letter, undated seating chart, and envelope in which she received these items to Bonnie Mager, then executive director of the Alliance, on or about early March 2005. (CP 90-93; 100-103.) On February 22, 2005, a second iteration of the seating chart was printed and

handed out to staff. The chart no longer had the names "Ron and Steve" in a cubicle but instead simply had the words "New" in two other cubicles. (CP 285, 291-294, 276-280.)

On or about the first two weeks of March 2005, Spokane County posted notice of two openings for the position of Development Assistant Coordinator and subsequently hired a "Steve and Ron." (CP 257-275.) After interviews conducted by Building and Planning Administrative Director James Manson, and Assistant Directors Pam Knutsen, Mark Holman, and John Pederson, on March 18, 2005 Spokane County hired *Steve* Harris, the son of then Commissioner Phil Harris, as Development Assistance Coordinator 1 to work with *Ron* Hand, who had also been recently hired as Development Assistance Coordinator 2. (*Id.*)

On May 3, 2005, Bonnie Mager, on behalf of the Neighborhood Alliance, sent a public records request to Spokane County asking for all records created in January 2005, February 2005, and March 2005 "that display either current or proposed office space assignments for County Building and Planning Department officials." (CP 276-280.) On May 13, 2005, the County provided Ms. Mager with three copies of the "county planning seating chart," one of which was undated. (*Id.*; CP 153; 276-280.) The other two iterations of the chart were dated February 22, 2005 and April 18, 2005. (CP 276-280.)

By letter dated May 16, 2005, Bonnie Mager, on behalf of the Neighborhood Alliance, sent a letter to Spokane County requesting two Items. Item I requested:

> The complete electronic file information logs for the undated county planning division seating chart provided by Ms. Knutsen to the Neighborhood Alliance on May 13th. This information should include, but not necessarily be limited to, the information in the "date created" data field for the document as it exists on the specific Microsoft Publisher electronic document file created for the referenced seating chart. The requested information should also include, but not be limited to, the computer operating system(s) data record indicating the date of creation and dates of modification for the referenced seating chart document.

(CP 48-49; 51-52.)

The County responded to the May 16, 2005 request by letter dated June 6, 2005. (CP 49; 54-56.) In response to Item # 1, the County tendered one document – an electronic information log created for the undated county planning division seating chart located by Pam Knutsen, Assistant Director of Building and Planning for Spokane County, in her new computer, the only place she searched. (CP 61, 65.) The electronic information log for the undated county seating chart included "date created," "date modified," and "date accessed" data fields. (CP 65.) The "date created" data field listed on the information log showed that the seating charts were "created" at a later date than the "date modified" data

fields. (*Id.*) After the Alliance filed suit, the County attempted to explain this discrepancy through affidavits of Ms. Knutsen and Bill Fielder, the Director of the Information Systems Department (ISD). (CP 61-62, 57-59.) Ms. Knutsen explained that her personal computer (PC) was replaced on April 26th and 27th, 2005 at which time the data on her old personal computer was copied to her new computer. "When that copying takes place, all documents are given a new 'Date Created.' Once all documents are copied, the new PC is delivered to the County employee." (CP 61-62.) Thus, the electronic log provided to the Alliance did not contain the original date created as requested, but only the date of data transfer.

Mr. Fielder explained that after data transfer, old computers are taken back to the ISD office and wiped clean of all data prior to rebuild for another employee or sale. (CP 58.)[1] Ms. Knutsen's old computer eventually had its hard drive wiped when it was given to Spokane County employee Gloria Wendel in August of 2005, three months after Bonnie Mager's request for records stored in that computer. (CP 494, 602-607.)

By letter dated November 28, 2005, Plaintiff's counsel made a public records request for the "email or memo requesting that Ms. Wendel receive Ms. Knutsen's computer and the documentation showing when

[1] The County misstates these facts in its cross petition wherein it claims there was no data left on Ms. Knutsen's old hard drive after the files were copied to her new computer and that the "complete information log" was provided to NASC. Resp's Resp. and Cross Pet., at 8-9, 14).

Ms. Knutsen's computer was wiped of data." (CP 600-607.) The County responded on December 5, 2005, by providing records regarding computer work done for Ms. Wendel in August 2005. ( CP 596-599; CP 600-607.) In its answers to a written deposition, the County admitted that it did not know the date Ms. Knutsen's hard drive on her old "PC" was wiped and that there was no record that it was wiped prior to Bonnie Mager's May 16th request for records from that computer hard drive. (CP 608-612.) Further, the County admitted in deposition that it made no efforts to confirm whether or not Ms. Knutsen's old "PC" retained any record of the seating chart in response to Bonnie Mager's request for records from that hard drive. (*Id.*) Nor did the County state whether or not Ms. Knutsen had copied the county planning seating chart into another directory for storage and backup.

Although data stored on local PC's like Ms. Knutsen's is not backed up, the County requires its employees to copy and paste documents created on behalf of the agency on the appropriate directory or network for storage and backup by ISD. (CP 287-288; 332.) Apparently, Ms. Knutsen did not follow this practice, at least in this instance, or any backup was subsequently deleted, as in her written deposition she stated there was no reason to believe an electronic version of the chart would be found on any other county computer or network. (CP 431.)

Finding the County's affidavits on this issue conclusory, lacking in sufficient detail to evidence an adequate search, and controverted by other evidence in the record, the Court of Appeals held the County failed to conduct an adequate search for the complete electronic log showing the date the seating chart was created. *Neighborhood Alliance of Spokane County v. Spokane County*, 151 Wn. App. 1043, 2009 WL 2456857 at 7 (Wn. App. Div. 3 2009).

On January 13, 2010, the Alliance filed its Petition for Review in the Court of Appeals, Division III with service on the County the same day. Pet. for Rev., *Neighborhood Alliance* v. *Spokane County*, No. 271846 (Jan. 13, 2010). The County filed an answer and cross-petition on February 12, 2010, not in the Supreme Court as required by the rules, but in the Court of Appeals, Division III. Resp't's Resp. to Pet. Rev. and Cross-Pet. for Rev., *Neighborhood Alliance v. Spokane County* (Feb. 12, 2010).

## C. ARGUMENT

The County requests review of the Court of Appeal's decision finding the search for the complete electronic information log inadequate. It claims the decision was fundamentally flawed and places agencies in jeopardy of unlimited penalty assessment with no clear cut-off date for liability where the violation was based on destroyed records. In its

argument, the County fails to provide a clear and concise statement why this decision falls within any of the mandatory criteria under RAP 13.4 (b) for discretionary review. In its conclusion, however, the County states the decision is of significant public interest because it chills agencies' appellate rights in clear conflict with Washington State Supreme Court case law.

The Alliance answers that this Court need not review the issue regarding the adequacy of the search as the County cited no appellate cases in conflict with the decision and the issue is not of constitutional dimension nor of significant public interest where, under these facts, the search was unreasonable on its face. Likewise, the Court need not review the issue regarding the assessment of penalties as this Court has clarified that under the penalty provisions of the State Public Records Act ("PRA"), trial courts may not adjust the number of days for which the agency is fined where access was wrongfully withheld. *Soter v. Cowles Pub. Co.*, 162 Wn. 2d 716, 756, 174 P.3d 60 (2007).

1. The decision that the County's search for the complete electronic log was inadequate does not conflict with prior Supreme Court or Court of Appeals' precedent, is not a significant issue of constitutional law, and is not an issue of significant public interest.

    a. The decision did not create a new cause of action or basis for liability under the PRA.

The County claims the Court of Appeals created an "entirely new cause of action under the PRA." Resp't's Resp. to Pet. Rev. and Cross-Pet. for Rev, *supra* at *9*. There is no new cause of action here. The State Public Records Act ("PRA") already requires agencies to respond in good faith to records requests.

Under the PRA, agencies must provide "the fullest assistance to inquirers and the most timely possible action on requests for information." *Spokane Research & Defense Fund v. West Cent. Cmty. Dev. Ass'n*, 133 Wn. App. 602, 606, 137 P.3d 120 (2006)(quoting former RCW 42.17.290) (1995). An agency does not do so if it fails or refuses to perform a reasonable search.

As there appear to be no reported state law cases defining what constitutes a reasonable search, the court appropriately relied on cases construing the Freedom of Information Act ("FOIA"). *Neighborhood Alliance,* 2009 WL 2456857 at 6 *citing Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). Under these, "[t]he adequacy of the agency's search is judged by a standard of reasonableness, construing the facts in the light most favorable to the requestor." *Neighborhood Alliance*, 2009 WL 2456857 at 6 *quoting Citizens Comm'n on Human Rights v. Food & Drug Admin.*, 45 F. 3d 1325, 1328 (9th Cir. 1995). An agency fulfills its obligations if it acts in good faith, uses methods reasonably

calculated to uncover all relevant documents, and does not limit its search to one place where there is evidence of additional sources likely to produce the requested records. *Neighborhood Alliance,* 2009 WL 2456857 at 6-7 (citations omitted).

The Alliance requested the complete electronic log showing the date of creation of the document, not the date the documents were transferred to Ms. Knutsen's computer. Thus, the only place the documents requested could *not be* found was in Ms. Knutsen's new computer. Yet this was the *only* place Ms. Knutsen searched. Moreover, the County admitted it had no evidence Ms. Knutsen's computer was not still intact prior to August when it was rebuilt.

The County had ample opportunity to provide evidence by affidavit of a County policy requiring a hard drive wipe at the time a computer is replaced. It did not. Rather, the evidence shows the standard practice was simply to wipe hard drives prior to rebuild or sale. The County's own records confirm this computer was not rebuilt until August, almost three months after the request and two months after the response.

Under these facts, a search reasonably calculated to find the complete electronic log would have included Ms. Knutsen's old computer. Moreover, such a search was hardly burdensome. All Ms. Knutsen had to do was to simply ask ISD whether her computer had already been wiped

in preparation for another use. If not, the record would still have been on the hard drive and could have been provided to the Alliance. If so, Ms. Knutson could have explained as much in her response and, to the extent no electronic copies existed on another network or backup system, the County would have fulfilled its duty under the PRA as to this record.

b. The decision does not set a higher bar than that set by federal law.

Contrary to the County's assertion, the Court of Appeals did not hold it to a higher standard than that required under federal law. It did not require the County to conduct an exhaustive search of every conceivable place responsive documents could have been found, no matter how speculative, implausible, or unusual. Nor did it require a "perfect search." Rather, because the evidence indicated the computer where the records were stored was not prepared for another employee until August, almost three months after the request, the court simply found it unreasonable for the County not to have searched the old computer.

By not looking in the one computer that would show the crucial "actual date of creation" of the seating chart, the County conducted an inadequate search thereby ensuring the records would be destroyed, if they had not been already. In doing so, the County denied the Alliance access to these records in violation of the state PRA. RCW 42.17.340(4)

(penalties assessed for each day a person is denied the right to inspect or copy a public record).

c. It was the County's burden to show it acted in accord with the requirements of the PRA.

The County also argues that the court impermissibly shifted the burden of proof by requiring it to prove there were no responsive documents in Ms. Knutsen's old computer at the time of the request. Resp't's Resp. to Pet. Rev. and Cross-Pet. for Rev., *supra* at 18. The County misapprehends agency burdens under the PRA and the court's decision.

First, under the PRA, the party seeking to prevent disclosure bears the burden of proof. *Limstrom v. Ladenburg* 136 Wn.2d 595, 612, 963 P.2d 869 (1998), as amended on denial of reconsideration; RCW 42.17.340(1). Second, the question of whether an agency conducted an adequate search "is separate from the question of whether the requested documents are found." *Neighborhood Alliance*, 2009 WL 2456857 at 6 *citing Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 326 (D.C. Cir. 1999). "As the federal courts have made clear, 'the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*.'" *Neighborhood Alliance*, 2009 WL 2456857 at 6 *quoting*

*Weisberg v. U.S. Dep't of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1983). Thus, the focus of the court was appropriately on the search, not the result.

The County is correct, however, that by the time of trial, it was difficult, if not impossible, to prove whether the documents had been destroyed before the request. This conundrum was of the County's own making. To reduce its liability, all the County had to do was to ask ISD about the status of the old computer in responding to the request. Further, under these facts, the County arguably had a duty to do so, not only to conduct a good faith search, but also to preserve the records.

Under the PRA, "if a public records request is made at a time when such record exists but is scheduled for destruction in the near future, the agency. . . may not destroy or erase the record until the request is resolved." RCW 42.56.100 (former RCW 42.17.290). The County knew the records were slated for destruction as soon as the old computer was revamped for another purpose. Had Ms. Knutsen conducted a reasonable search by calling ISD, the County would have been in a position not only to preserve the records as required by the PRA if they were still stored in the computer, but also to demonstrate their nonexistence if they weren't. The duty was the County's and the ability to limit its liability or avert suit entirely, at least on this issue, within its own control.

The County cites to no state appellate cases in conflict with the holding on the search nor is the issue of constitutional import or significant public interest under these facts.

2. The decision did not create unlimited liability in conflict with Washington law.

The County argues the decision provides for the assessment of penalties from the date of the request with no cut-off date in conflict with existing Washington law. Resp't's Resp. to Pet. Rev. and Cross-Pet. for Rev., *supra* at 19. In support of this contention, the County cited to only one case, *Yousoufian v. Office of Sims*, for the proposition that penalties are assessed based on the amount of days a party was denied access. 165 Wn. 2d 439, 452, 200 P.3d 232 (2009).[2]

The proposition that penalties are based on the days a plaintiff is denied access derives from the plain meaning of the PRA which provides for penalties for "each day" the plaintiff "was denied the right to inspect or copy said public record." RCW 42.17.340(4). The County appears to argue that agencies conducting inadequate searches should not be subject to this provision where the violation is based on destroyed documents for

[2] Although this decision was withdrawn by this Court in June 2009, the proposition was based on the Court's prior holdings and as such is still good law. *Yousoufian*, 165 Wn. 2d at 439 *citing Yousoufian v. Office of Sims* (*Yousoufian II*), 152 Wn. 2d 421, 440, 98 P.3d 463 (2005)( penalty based on number of days a plaintiff is denied access to requested records is a question of fact to be determined by the trial court). *See also* Order, *Yousoufian v. Office of Sims*, No. 80081-2 (June 12, 2009) (granting motion for reconsideration and recalling mandate).

which there is no way to provide access and hence no date in which to cut-off liability. Such a reading is contrary to this Court's prior holdings and contrary to legislative intent.

In *Soter,* this Court clarified that this provision does not grant trial courts the discretion to spare an agency per diem penalties based on agency actions to reduce exposure. *Soter*, 162 Wn. 2d at 756. Rather, this Court held that "if an agency has improperly denied a requester access to a public record, per diem penalties apply for every day that access was denied." *Id.* at 758 *citing Koenig v. City of Des Moines,* 158 Wn.2d 173, 189, 142 P.3d 162 (2006)(trial court required to impose penalty within statutory range for each day records withheld).

The PRA's penalty provision is intended to "discourage improper denial of access to public records and [encourage] adherence to the goals and procedures dictated by the statute." *Hearst Corp.,* 90 Wn. 2d at 140. "When determining the amount of the penalty to be imposed the existence or absence of [an] agency's bad faith is the principal factor which the trial court must consider." *Yousoufian II,* 152 Wn. 2d at 435 *quoting Amren v. City of Kalama*, 131 Wn. 2d 25, 37-38, 929 P.2d 389 (1997). "A penalty is specifically designed to insure performance of statutory duties and can be imposed whenever a violation of duty has occurred." *Yacobellis v. City of Bellingham*, 64 Wn. App. 295, 301, 825 P.2d 324 (1992), abrogated on

other grounds by *Amren,* 131 Wn. 2d 25. Thus, the purposes of the PRA are best served by "increasing the penalty based on an agency's culpability," (*Yousoufian II*, 152 Wn. 2d at 421) and not by reducing the daily compilation.

Under *Sotor*, trial courts may not reduce the daily compilation based on positive actions taken by an agency to curb the accumulation of daily penalties. It makes no sense then to hold courts may do so when an agency takes actions rendering disclosure impossible. Such a reading would encourage the destruction of "inconvenient" records as soon as possible after request thereby ensuring that, even if the maximum per diem penalty of $100 were assessed, liability would be capped to just a few hundred dollars.

In *Yacobellis* , the trial court faced a similar situation. 64 Wn. App. 295 at 297-98. There, the City denied the plaintiff access to golf surveys and subsequently destroyed the records. On appeal, the court determined the records should have been disclosed and remanded for a determination of statutory penalties. *Id.* at 297. On remand, the trial court determined the applicable time period for computation of the statutory award ran from the date of the request through the date the Supreme Court denied review of the matter. *Id.* at 299. Although neither party challenged the trial

court's daily computation, the award comported with the letter and spirit of the PRA.

In *Yacobellis*, it was the City's wrongful withholding and subsequent destruction of records which denied access to the plaintiff. Similarly here, it was the County's wrongful failure to conduct a reasonable search and destruction of documents which denied the Alliance access. The fact that by the time of trial the County could no longer demonstrate whether the documents existed at the time of the request is entirely its own fault and should not be used to reduce the penalty through a reduction of the daily computation. The PRA has been construed to address these issues by an adjustment of the per diem penalty amount, not a reduction in the compilation of penalty days. Such a construction comports with existing case law and legislative intent to promote disclosure and discourage improper denial of access.

3. The answer and cross petition were improperly filed.

Not only does RAP 13.4(d) provide that an answer to a petition for review should be filed in the Supreme Court within thirty days after service on the party of the petition, the parties herein received a letter from the Deputy Clerk of the Supreme Court on January 21, 2010 directing them to review the provisions of RAP 13.4(d) regarding the filing of any answer to the petition for review and any reply to the answer. RAP

13.4(d); Letter, Supreme Court Deputy Clerk, *Neighborhood Alliance of Spokane County v. County of Spokane,* Supreme Court No. 84108-0, Court of Appeals No. 27184-6-III (Jan. 21, 2010). Nevertheless, the County appears to have filed its answer not in the Supreme Court as directed, but in the Court of Appeals. If this is so, the answer and cross petition appear to have been untimely and improperly filed.

## D. CONCLUSION

The County has made no showing under RAP 13.4 (b) supporting discretionary review of the Court of Appeal's holding that the County violated the PRA by conducting an inadequate search. On this basis and because the PRA and appellate case law require a trial court to award penalties for each day the Alliance was wrongfully denied access to the complete electronic log, the Alliance requests this Court to decline review and affirm the decision below as to this issue. The Alliance further asks this Court to remand to the trial court for a determination of the following: 1) the days access was denied and the appropriate per diem penalties as required by RCW 42.17.340(4); 2) attorney fees and costs pursuant to RCW 42.17.340(4) and 3) a determination of attorney fees and costs on

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appeal related to this issue as allowed by RAP 18.1(i) and (j). The Alliance also renews its request for an Order of discovery on the issue of penalties on remand.

Respectfully submitted this 24th day of February, 2010.

Bonne Beavers, WSBA #32765
Breean L. Beggs, WSBA #20795

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing Petitioner's Answer to Respondent's Cross-Petition for Review by the following indicated method or methods:

[X] by **hand-delivering** a full, true, and correct copy thereof to the person shown below:

PAT RISKEN
EVANS, CRAVEN & LACKIE
LINCOLN BUILDING #250
818 W. RIVERSIDE AVENUE
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[X] by sending a full, true and correct original and one copy via Fed Ex Priority Overnight addressed to the Supreme Court Temple of Justice, 415 12th Avenue SW, Olympia, WA 98504.

DATED this 24th day of February, 2010.

Cathy Johnson, Paralegal